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Antitrust Damages, European Competition Law and Judges: Private and Public Enforcement. Articles 101, 102 and 107 of TFEU and National Judges (REFJ1224)

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15:00 h. Round table : National Judicial Experiences on Private Enforcement on Competition Law after *Courage* and *Manfredi* Judgments

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NATIONAL JUDGES EXPERIENCES IN APPLYING PRIVATE LAW TO COMPETITION AFTER THE COURAGE AND MANFREDI RULINGS

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A study of developments in the application of antitrust rules in the Spanish legal system should take two key aspects into consideration:

First - From the beginning (Act 110/1963, of 20 July, on abolishing restrictions to competition) until very recently, the Spanish antitrust system has followed a public model of applying antitrust legislation in which the regulatory authorities (at first, national and sectoral and subsequently regional) were solely responsible for investigating and penalising restrictive behaviour.

Second - In Spain, as in most of the EU Member States, national competition rules coexist with Community provisions, which means a distinction must be made between the two levels. Deciding which authorities are competent to apply one rule or the other is particularly important. This legislative duality leads to a differentiation between the judicial application of Community rules and the judicial application of national competition rules.

1) Application of Community competition laws by Spanish courts

Until very recently, Spanish courts' competence in the antitrust field was restricted to reviewing the decisions of regulatory authorities and establishing legal and private effects after unlawfulness was declared by the Commission or the Spanish Court for the Defence of Competition.

Case law and Community legislation on the enforcement of Articles 80 and 81 TEC brought a radical change to this situation. Despite the Spanish legal system's initial reluctance, it gradually recognised Community court arguments on the direct effect of competition rules, the public nature of the provisions and the benefits of court intervention. Spanish commercial courts began to apply Articles 80 and 81 TEC to competition and integrated mechanisms for coordination and cooperation between the courts and regulatory authorities into national law.

The Supreme Court ruling of 30 December 1993 *(CAMPSA)* is one example of the period in which courts were denied the competence to apply Community rules: "*Given the clear separation between Administration and Jurisdiction, what determines whether the latter can try matters that are the competence of the Administration (without prejudice to a judicial review of the Administration's acts), it cannot be said (as the appeal does) that this is a pre-trial issue construed as a judicial proceeding that should be carried out first, in order to arrive at a final ruling on the issue decided in the main case (...). Therefore, the conclusion is that the cause of action in paragraph one of the claim is the sole competence of the Spanish Administration and, within it, of the Court for the Defence of Competition, and not the competence of the civil courts and tribunals.*" Moreover, the ruling indicated that national courts could not deliver ruling on compensation for damages because, pursuant to Article 13.2 of Act 16/1989, of 18 July, on the Defence of Competition, such a ruling required the administration's prior declaration of unlawful behaviour.

Despite the arguments put forward in the CAMPSA ruling, which were repeated in subsequent cases (Supreme Court ruling of 4 November 1999), some Provincial Courts (Higher Court [HC] in Burgos ruling of 24 April1989, HC in Badajoz ruling of

29 November 1991, HC in Gerona ruling of 11 January1993 and Higher Court of Justice in Catalonia ruling of 4 December 1997 declared the application of Community law based on the principle of the direct applicability of Community law and CJEU case law.

Spain's Supreme Court recognised the competence of Spanish courts to apply Community law to competition in the Supreme Court ruling of 2 June 2002 (*Disa).* It also recognised that the effects and scope of nullity were governed by national substantive and procedural rules. It bears mentioning that the undertaking that requested the annulment was the same one that gave rise to the annulment. The undertaking based its breach of contract on the contract's unlawful binding obligation. Moreover, since the contract was void ab initio, the annulment could be ordered at the court's own motion. The change of legal attitude was maintained in the Supreme Court rulings of 2 and 5 March 2001, 23 December 2004, 22 June 2006 and 3 October 2007.

Article 83 ter was added to the Spanish Organic Law 8/2003 of 9 July, in compliance with Article 6 of Regulation 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. The article's paragraph 2.f) recognised the competence of the commercial courts to hear the proceedings laid out in Articles 81 and 82 of the EC Treaty and related law.

2) Judicial application of national laws on free competition

At first, the Spanish courts made it clear that the direct implementation of free competition rules was the sole responsibility of the administrative authorities (the Defence of Competition Agency and the Court for the Defence of Competition). The courts could only intervene in reviews of the administrative decisions and in declarations of the civil effects of infringements, which, pursuant to Article 13.2 of the former Act 16/1989, was only possible after an administrative declaration of unlawful behaviour. Antitrust victims had to request two procedures: First, to the Spanish Constitutional Court and, after obtaining a verdict, they could go to a court to request an annulment or the civil liability of the offenders.

The Spanish legal system opposed the direct application of national legislation on competition despite the fact that Community case law recognised the direct effect of Community competence rules and entrusted the task of guaranteeing the effectiveness of the provisions to the national courts.

The Supreme Court ruling of 31 December 1979 (Asociación de Agentes Mayoristas de Vizcaya) was an exception to this trend, in that it made use of the nullity of contract opposed by the defendant, on the basis that it was against economic public order and its purpose was unlawful.

One notable example of the absolute opposition to judicial application of Community law during this period was the Supreme Court ruling of 18 May 1985, which upheld the court's lack of competence and the administrative authorities' sole competence in applying Community law. Subsequently, the Supreme Court ruling of 4 November 1999, in a broad interpretation of Article 13.2 of Act 167/1989, considered that the requirement of a prior administrative decision applied to offenders' civil liability claims and also to cases that sought a ruling that a legal transaction was void ab initio. The Supreme Court's interpretation of the article was that the administrative declaration of unlawful behaviour was only required with regards to compensation for losses.

Scientific doctrine criticized the dual administrative and judicial procedure system and suggested alternative options to facilitate court intervention in the application of antitrust laws, such as the Law on Unfair Competition (Article 15.2,

unfair competition by violation of laws; and Article 4, infringement of the general clause forbidding unfair behaviour and conduct).

3) Period prior to adoption of Act 15/2007, of 3 July, on the Defence of Competition

When Regulation 1/2003 came into force, the Spanish legal system's lack of coherence with regards to the competence of national courts to apply antitrust laws became evident. The paradox was that commercial courts could apply Articles 80 and 82 TEC and declare the legal and private effects of infringing them, but they could not apply national laws directly. To do so was the sole competence of the administrative authorities, which meant that a prior administrative decision on infringement was required.

In practice, infringement of Community law was frequently alleged in order to have access to the private enforcement of Community competition law and related benefits.

The adoption of the current Defence of Competition Act (DCA) put an end to the problems arising from the courts' lack of competence to apply national antitrust laws. The act's first additional provision expressly recognised the commercial courts' competence to apply Articles 1 and 2 DCA. Subsequently, Organic Act 137/2007, of 19 November amended Article 86-ter-2-f of the Spanish Organic Law of the Judiciary, giving commercial courts competence to try "proceedings on the application of the articles stipulated in the Defence of Competition Act"

The commercial courts may now apply provisions regarding (Community and national) collusive arrangements and abusive behaviour either primarily or incidentally. Currently, they can pronounce infringements, order the ceasing of behaviour and dismissal of effects that are contrary to public interests, and rule that collusive agreements and contracts are void ab initio and the liability of offenders. Moreover, none to such rulings is subject to a prior administrative decision.

4) The experience of Spanish courts in the application of free competence laws

In general, on the basis of the direct effect of Community laws, most of the rulings pronounced after the Disa ruling recognise that Spanish courts are empowered to apply Community laws on competition.

Most of such rulings refer to complex contracts on commercial distribution relationships (concessions, distribution and agencies), as well as sales, usufruct and/or leases related to service station operations that stem from contracts between fuel producing companies and their lessees and/or agents and resellers.

Typically, litigation in such cases involves two issues: 1) The nature of the contractual relationship (agency contract or no agency contract); 2) Whether the behaviour and the convents agreed upon are lawful or not: for instance, non-competition clauses, exclusivity agreements, clauses setting reseller prices and exemptions under a REC 2790/1999.

Several decisions coincide in expressing that the judicial application of free competition laws should not be used to avoid contractual commitments or to infringe their scope.

In many cases the following sequence in reasoning has been found: Examination of compliance in the cases where Community law applies, verification of whether behaviour can be classified as restrictive in such cases and, finally, whether the behaviour can be considered exempt or not. Then the legal and private consequences arising from the unlawful behaviour are defined.

There are less rulings on the application of national competition laws because the commercial courts' specific competence in that field was only regulated up to the adoption of the current DCA.

Occasionally issues arose in relation to the lack of objective competence when action for performance of a contract was brought before a Court of First Instance and for the contract's infringement of antitrust laws was challenged with an exception or counterclaim.

Recent rulings on the abuse of dominant positions by undertakings that had a previous status of monopolies (Commercial Court ruling [SJM] Barcelona-2 of 20 January 2011 and SJM Madrid-8 of 24 March 2010), and that are currently monopolies (SJM Alicante-3 of 26 March 2012) are worth highlighting.